NO. 21769

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

JOHN TENOPIR,	)
	)
Appellant.	)
	)
-vs-	)
	)
STATE FARM MUTUAL AUTOMOBILE INS. CO.,	)
	)
Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This action was commenced by the filing of a complaint
the United States District Court for the District of Alaska,
d a final decision dismissing the plaintiff-appellant's, John
nopir's claim against State Farm Mutual Automobile Insurance
. was rendered on January 10, 1967.

This appeal is taken from said decision pursuant to
e provisions of 28 USC 1291, which confers jurisdiction of
peals from all final decisions of the United States District
urt in the United States Court of Appeals, and 28 USC 1294
) which designates the circuit embracing said district as
e proper Court of Appeals to which such appeal shall be directed.

STATEMENT OF THE CASE

At about 11:30 o'clock P.M. on July 26, 1964, appellant hn Tenopir was seriously injured in an automobile accident ile riding as a passenger in the back seat of his own car. omplaint paragraph I and VI). At the time of the accident nopir's car was being driven by Howard Golliheair (Complaint, ragraph I) with Tenopir's permission. (Complaint, paragraph IV). nopir brought suit against Howard Golliheair and others in the perior Court for the State of Alaska in an effort to gain covery for the injuries he received from the accident. (Complaint ragraph VII).

Tenopir had in effect at the time of the accident an tomobile insurance policy with the Appellee, State Farm. mplaint, paragraph III). Under the policy Tenopir was the med insured and Howard Golliheair was an additional insured. ertheless in the State Court suit State Farm refused to fend Golliheair. (Complaint paragraph IX).

A judgment was entered in favor of Tenopir against ward Golliheair for $124,228.60 in the State Court suit. mplaint paragraph XI). To satisfy this judgment, Golliheair signed his rights under the State Farm policy to Tenopir. mplaint paragraph XII). Tenopir then brought suit against te Farm and others in the United States District Court for

e District of Alaska alleging in addition to the above, that e State Farm policy applied in the situation described to insure lliheair against the personal injury claim of Tenopir and that ate Farm had an obligation to defend Golliheair against that aim. (Complaint, paragraph IX).

On October 10, 1966, the appellee, State Farm, filed a tion to dismiss Tenopir's claim, alleging that said claim iled to state a cause of action because the policy in question ecifically excluded from coverage any claim of the named insured r his own bodily injuries. Tenopir opposed the motion, alleging at the policy exclusion relied upon by State Farm was ambiguous d that the ambiguity had to be resolved against State Farm and rther argued that the meaning attributed to the exclusion ause by State Farm was contrary to the public policy of the ate of Alaska.

On January 10, 1967, the United States District Court ered a decision in favor of State Farm, dismissing Appellant nopir's claim. This appeal is brought by the Appellant Tenopir m said decision.

SPECIFICATION OF ERROR

I.

The trial court erred in granting defendant, State Farm Mutual's
tion to dismiss plaintiff's complaint against defendant for failure to state
claim against the defendant because the insurance contract of State Farm
ambiguous and when resolved against the insurer, the plaintiff-appellant
covered under said contract and states a sufficient cause of action.

II.

The trial court erred in granting State Farm Mutual's motion to
smiss in that the intent of the parties regarding the serge of the insurance
verage is a question of fact to be determined by the finders of fact, in
s case a jury.

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANT, STATE FARM MUTUAL'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST SAID DEFENDANT FOR FAILURE TO STATE A CLAIM AGAINST SAME IN THAT SAID COMPLAINT DID IN FACT STATE A LEGALLY SUFFICIENT CLAIM AGAINST THE DEFENDANT, STATE FARM.

A. When an insurance contract is ambiguous or uncertain in meaning such ambiguity or uncertainty must be resolved adversely to the insurer.

One of the basic rules of construction applicable to surance contracts is that whenever a policy is ambiguous or sceptible to more than one meaning, the policy must be construed rictly against the insurer and liberally in favor of the insured as to give effect to that construction of the policy which rmits recovery by the insured rather than the one which would ny coverage. This rule has been adopted throughout the United ates and has been cited with approval by the Supreme Court of aska in the cases of Lumberman's Mutual Casualty Co. v. ntinental Casualty Co., 387 P.2d 104 (Alaska 1963) and Pepsi-la Bottling Co. v. New Hampshire Insurance Co., 407 P.2d 1009 laska 1965).

The rule was also cited with approval by this court in e case of Hess v. National Indemnity Co. of Nebraska, 247 F.Supp.

44, 947 (D.C. Alaska 1965), wherein the court stated:

> "It is a well-settled rule of construction that where ambiguity or uncertainty exists in an insurance contract, such ambiguity or uncertainty will be resolved adversely to the insurer."

herefore, the principal issue to be decided by this court is whether
e insurance clause in question is susceptible to any meaning other
an that propounded by the defendant, State Farm.

B. The term "the insured" as used in the policy of insurance issued by the appellee State Farm Mutual to the appellant, John Tenopir is ambiguous in meaning.

(1) The phrase's ambiguity is reflected in the terms of the policy itself.

The insurance policy at issue in this case was
tached to plaintiff's complaint as Exhibit "B" in the court below.
page three of that policy under the definition section applicable
the insuring agreement sought to be enforced by the appellant
is stated:

> "INSURED - under coverages a, b, c and m the unqualified word "insured" includes
> (1) the named insured, and
> (2) if the named insured is a person or persons, also includes his or their spouse(s), if a resident of the same household, and
> (3) if residents of the same household, the relatives of the first person named in the declarations, or of his spouse, and

(4) any other person while using the owned automobile provided the operation and the actual use of such automobile are with the permission of the named insured or such spouse and are within the scope of such permission, and
(5) under coverages A and B any person or organization legally responsible for the use of such owned automobile by any insured as defined under the four subsections above."

In other words, five classes of people qualify as an "insured" under insuring agreements I and II of the policy.

Even though more than one person or class of persons are insureds under said policy the omnibus and exclusion clauses at issue speak in terms of "the insured". The fact that more than one individual can qualify as an insured under the policy raises the question as to whether the phrase "the insured" as used in said clauses is singular or plural in meaning. Who then is "the insured" under the facts of this case?

At the time of the accident, Howard Golliheair was driving the insured automobile (Complaint, paragraph I). While Mr. Golliheair did not own the insured automobile, he was driving it with the permission of the named insured (Complaint, paragraph II). Thus, Howard Golliheair qualifies as an additional insured under part (4) of the above quoted provision of State Farm's policy.

As an insured, Howard Golliheair was entitled to have ate Farm pay on his behalf

> "all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury sustained by other persons . . ." (emphasis added) (page 2 of insurance policy part (1) coverage (A) and (B)).

According to the judgment entered in the case John Tenopir v. Howard W. Golliheair (Exhibit "C" of the Complaint) ward Golliheair was legally obligated to pay John Tenopir 23,228.60 for injuries he sustained as a result of Howard lliheair's negligence. Nevertheless, State Farm has refused pay any part of said judgment. State Farm's refusal is based on the belief that an additional insured under the policy in estion is not insured against injuries he or she may negligently flict upon the named insured, John Tenopir.

As support of its position, State Farm relies upon clusion (i) contained on page 4 of said policy which states that le insurance policy does not apply to

> "bodily injury to the insured or any member of the family of the insured . . ." (emphasis added).

State Farm contended in the trial court below (page 3 State Farm's memorandum in support of its motion to dismiss) lat the words "the insured" in the above exclusion refer to the

med insured as well as the additional insureds. In order to cept State Farm's contention one must conclude that the phrase he insured" is plural rather than singular in meaning. Such a nclusion is contrary to the accepted usage of the word "the" nce according to Webster's Dictionary

> " 'the' (as opposed to 'a') is used to refer to a particular person . . . (such as) that (one) which is present, close, nearby, etc. as distinguished from all others, which are considered remote . . ."

State Farm apparently believes that the definition of nsured" stated on page three of its policy sufficiently alerts e insured to State Farm's alleged departure from accepted usage the word. However, appellant does not see how the definition sists in determining the difference in meaning between the rases "the insured","the named insured" and "an insured". The finition merely states

> "INSURED . . . the unqualified word 'insured' includes
> (1) the named insured, and
> (2) if the named insured is a person or persons, also includes his or their spouse(s), if a resident of the same household, and
> (3) if residents of the same household, the relatives of the first person named in the declarations, or of his spouse, and
> (4) any other person while using the owned automobile provided the operation and the actual use of such automobile are with the permission of the named

> insured or such spouse and are within the scope of such permission, and
> (5) under coverages A and B any person or organization legally responsible for the use of such owned automobile by any insured as defined under the four subsections above."

It is appellant's contention that when the word "insured" preceded by the word "the", the word "insured" is no longer nqualified". This is especially true when, as in the case at r, the word "insured" is frequently preceded by the words "an" ny" "each" and "the named" at various places throughout the licy.

In view of the above, appellant believes that if State rm really intended to exclude from coverage all bodily injuries flicted upon any insured by any other insured, it could and ould have been more explicit by using wording similar to that ntained in the following insurance policies:

> "This policy does not apply under Part I: . . . (12) to the liability of any insured for bodily injury to (a) any member of the same household of such insured except a servant or (b) the named insured. (As in State Farm's policy, Farmer's Insurance Exchange states in its definition of insured that "The unqualified word 'insured' includes . . ." Farmers Insurance Exchange Automobile Policy as of January, 1966, and

> "This policy does not cover, as respects named insured and/or any additional insured, any liability whatsoever . . . (3) For bodily injuries or death sustained by Named Insured or any other person claiming to be an insured hereunder." The policy of Pennsylvania Indemnity Corp. as found in Hepburn v. Pennsylvania Indemnity Corp., 109 F.2d 833, 834 (C.A. D.C. 1939).

(It should be noted that the definition of the word nsured" in both of the above quoted policies is identical to at contained in the State Farm policy at bar.)

Instead, State Farm chose to use the phrase "the insured" spite the fact that the phrases "the insured" and "an insured" nnot possibly have identical meanings in their proper context. r, as noted in Webster's Dictionary

> "The chief grammatical function of 'an' is to contrast with 'the' . . . ."

If State Farm had consistently used the phrase "the sured" throughout the policy wherever one might have expected find the phrase "an insured" or "the named insured", there ght be some validity to its contention that the phrase was tended to be synonymous with such phrases. However, no such age can be found in the policy. Instead, State Farm has equently used all three phrases throughout the policy. In fact, eful reading of the policy discloses that the phrase "the

med insured" was used approximately 52 times; that the phrase
n insured" was used approximately 36 times; that the phrase
ach insured" was used approximately three times; and that the
rds "any insured" were also used approximately three times.

For example, the phrase "an insured" was used in the clusion on page five of State Farm's policy wherein it is stated:

> "insuring Agreement III does not apply:
> (a) to bodily injury to an insured, or care or loss of services recoverable by an insured, with respect to which such insured . . ." (emphasis added)

e same phrase was also used in exclusion (f) on page four of e policy wherein it is stated that the insurance policy does t apply:

> "under coverages A and B, to bodily injury or property damage with respect to which an insured under this policy is also an insured under a Nuclear Energy Liability Underwriters of Nuclear Insurance Association of Canada or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability." (emphasis added)

Obviously there is no consistency in the phraseology the policy. If State Farm was able to modify the word "insured" th words such as "an". "any", "each", in approximately 42 places ere it wanted to convey the idea that a given statement applied

all five classes of insureds, how can it reasonably contend at its use of the word "the" was also meant to convey the same ea? Such a sontention on their part seems even more defensible in view of the fact that the phrase "the insured" also used in the policy in a singular context. The following e a few examples:

> "(2) As respects the insurance afforded under coverages A and B and in addition to the applicable limits of liability to pay:
>
> (a) costs taxed against the insured in any such suit and, after entry of judgment, all interest accruing on the entire amount thereof until the company has paid or tendered such part of such judgment as does not exceed the limit of the company's liability thereon; (emphasis added.)
>
> (b) premiums on bonds to release attachments not in excess of the applicable limit of liability, premiums on required appeal bonds, and the cost of bail bonds required of the insured because of accident or traffic law violation, not to exceed $250 per bail bond, but without any obligation to apply for or furnish any such bonds; (emphasis added)
>
> (c) expense incurred by the insured for immediate medical and surgical relief to others as shall be imperative at the time of the accident; (emphasis added)
>
> (d) reasonable expense incurred by the insured at the company's request, including loss of wages or salary not to exceed $25.00 per day, if such loss is incurred because of the insured's attendance at trial of any civil lawsuit in defense against allegation of bodily injury." State Farm Mutual Automobile Insurance Company policy, page 2.

"11. NOTICE OF CLAIM OR SUIT - COVERAGES A and B. The insured shall immediately forward to the company to the company every demand, notice, summons or other process received by him or his representative."(emphasis added). State Farm Mutual Automobile Insurance Company policy, page 4.

"2. ACTION AGAINST COMPANY. No action shall lie against the company. . . .(b) Under coverages A, B and division 1 of W-1 and W-2, until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company...." State Farm Mutual Automobile Insurance Company policy, Page 9.

"1. NOTICE OF ACCIDENT, OCCURRENCE or LOSS. In the event of an accident, occurrence or loss, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place...." (emphasis added) State Farm Mutual Insurance Company policy, page 9.

Appellant believes that the above noted use of the words he", "an" and "the named" before the word "insured" in State rm's policy indicates that differentinsureds are being referred by each different phrase. "The named insured" obviously refers the policy holder. "An insured" necessarily encompasses all ve classed of insureds including the named insured. Therefore, ne insured" apparently must designate the particular insured eking protection under the policy.

Appellant believes the above distinction is reasonable rd that it attributes a reasonable definition to each phrase.

As indicated by the cases cited on page 16 of this

ief, it is not necessary for one to conclude that the definition "the insured" propounded by appellant is the only way of terpreting the phrase; nor is it necessary for one to conclude at the definition propounded by State Farm is completely without rit. As long as more than one interpretation can reasonably given the phrase it must be interpreted in the manner most vorable to the insured.

(2) The phrase's ambiguity is evidenced by the division of authorities as to its meaning.

In the court below State Farm cited cases from nine risdictions in support of its contention that the phrase "the sured" does not refer solely to the insured seeking protection der the policy. It went on to contend on page (1) of its ply Memorandum and again on page (4) of oral argument anscript that there exists no contrary authority to the holding those cases. As is indicated below, such a contention is mpletely inaccurate.

One very recent case directly on point is Farmers surance Exchange v. Frederick, 53 Cal. Rptr. 457 (1966). In at case the owner of a pickup truck was injured while riding erein as a passenger. His policy of insurance excluded from verage "bodily injury to the insured or any member of the nily of the insured residing in the same household as the

sured." (emphasis added). The policy also defined the qualified word "insured" as including ". . . the named insured d his relatives, (b) with respect to the described automobile, y other person . . . provided the actual use of the automobile by the named insured or with his permission, ..." The lifornia court held that the quoted exclusion

> "does not prevent the named insured from a recovery for bodily injuries suffered as a consequence of negligent operation when someone other than the named insured is properly driving his vehicle."(Supra at 459)

so holding it declared that the phrase "the insured" referred the person who actually drives the car whether such driver be e named insured or some other who drives with the permission the named insured. Its reasons were stated thusly:

> "It is clear, we think, without any ambiguity that when Frederick (the policyholder) purchased the policy, and when Farmers issued and sold it to him that both parties contracted not only that it would insure Frederick against public liability, but that it would in addition insure anyone who drove the vehicle with Frederick's permission. Frederick therefore is not suing himself. He is suing Edwards, a third person, for whom he also contracted and for whose liability Farmers agreed to become responsible." (Supra at 459)

> "In our opinion, if Farmers, by the exclusion meant to include within its operative effect injuries to the named insured even though some other

> insured was driving, the language of the exclusion must be such as to leave no doubt that the definition of "insured" is not merely for contractural convenience, but that the named insured can never recover under the policy, or can recover only in certain situations, irrespective of who drives. The exclusion at bench is not that certain." (Supra at 461)

Many other cases exist in which courts have held that e phrase "the insured" as used in insurance policies such as at at bar refers merely to the person seeking protection under e policy rather than to all persons who qualify as insureds ereunder. These cases include:

North River Ins. Co. v. Connecticut Fire Ins. Co., 233 Supp. 31 (D.C. Va. 1964) aff'd 341 F.2d 913 (4th Cir. 1965); rm Bureau Mut. Auto. Ins. Co. v. Smoot, 95 F.Supp. 600 (D.C. Va. 1950); Pleasant Valley Lima Bean Growers & Warehouse Ass. v. l-Farms Ins. Co., 298 P.2d 109 (Calif.); Pullen v. Employers' ability Assur. Corp., 89 So.2d 373 (La. 1956) reversing 72 So.2d 3 (La.App. 1954); Minneapolis, St. Paul & Sault Ste. Marie R. Co. St. Paul Mercury-Indemnity Co., 129 N.W.2d 777 (Minn. 1964); cyland Cas. Co. v. New Jersey Mfrs. Cas. Ins. Co., 137 A.2d 7 (N.J. Super 1958) affirmed 145 A.2d 15; Greaves v. Public rvice Mut. Ins. Co., 155 N.E.2d 390 (N.Y. 1959); Employers' ibility Assur. Corp. v. Liberty Mut. Ins. Co., 167 N.E.2d 142

hio 1959); Cimarron Ins. Co. v. Travelers Ins. Co. 355 P.2d
2 (Or. 1960); Ginder v. Harleysville Mut. Casualty Co., 49
Supp. 745 (D.C. Pa.) aff'd 135 F.2d 215 (3rd Cir. 1943); New
General Casualty Co., 133 F.Supp. 955 (D.C. Tenn. 1955).

In each of the above cases the term "insured" was
fined in the same manner as it is in the case at bar.

State Farm contended in the court below (page 2 reply
mo) that the above quoted cases are inapplicable to the issue
bar since they involve an exclusion which pertains only to
rtain employees of the insured rather than to the insured himself
members of his household. Appellant believes that such a
ntention is without merit. In each case an exclusion existed
the insurance policy which stated coverage would not be
ovided for "bodily injury to any employee of the insured . . ."
each case the person injured was an employee of "an" insured
t was never an employee of the particular insured for whose
otection the policy was being invoked.

It is apparent therefore that in each case the court
s required to determine the same issue with which this court is
nfronted; i.e. to whom does the phrase "the insured" refer? In
riving at their decision as to whom is meant by the phrase
he insured" the above courts made the following typical
mments:

"Can it be said that it is clear and unambiguous that an employee of "the insured", as used in the policy, was intended to mean an employee of 'any insured'? If this was intended, why was the policy not so worded, thus clearly expressing an intent to exclude the liability to the employee of any insured regardless of which insured was presently seeking protection under the policy?" North River Ins. Co. v. Connecticut Fire Ins. Co., 233 F.Supp. 31, 38 (D.C. Va. 1964)

"The exclusion clause uses the term "employee of the insured" not "all insureds" which means that it is directed to the situation of some particular insured. The term could apply to 'the insured named in the policy', 'the person qualifying as an additional insured' or 'the insured calling for protection'. When more than one person is included within the singular term, 'the insured', an ambiguity results." (emphasis added) New v. General Casualty Co. of America, 133 F.Supp. 955, 958 (D.C. M.D. Tenn. 1955)

"Policy in question employs in many places the term 'the insured' and'the named insured'. An occasional clause or paragraph uses both terms. Evidently they are not employed synonymously. Although it is perplexing at times to detect the draftsman's distinction in their meaning, he apparently employed the term 'the named insured' where he wished to designate the policy holder, and the term 'the insured' where he had in mind the additional insured. The facts just mentioned are supplementary factors that indicate that the terms 'the insured' where it appears in the exclusion clause is ambiguous." Cimarron Ins. Co. v. Travelers Ins. Co., 355 P.2d 742, 749 (Or.1960)

In reviewing the various decisions regarding the meaning

of the term "the insured" the Oregon Supreme Court in the Cimarron case also stated:

> "It is clear that there is a division in the authorities as to which insured is designated by the term 'the insured'. Appleman, Insurance Law and Practice, Sec. 7404 says: "The very fact that a number of courts have reached conflicting conclusions as to the interpretation of a contract provision is frequently considered evidence of ambiguity.' American Jurisprudence, Vol. 29, Sec. 260, Insurance, in referring to the rule that ambiguities are resolved against their creator states: '. . . Conversely, the rule does apply there the existence of am ambiguity is shown by the fact that various courts in construing the language in question have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof.' The fact that some courts hold that the words 'the insured' designate the policy-holder or named insured while other courts of equally high rank deem that the words allude to the insured who seeks the policy's protection evinces that the words are not free from ambiguity and uncertainty." Supra at 746

Consequently the Oregon court held that the ambiguity must be resolved in favor of the insureds.

Appellant asserts that the "employee" cases cited above are no less applicable to the case at bar than the "family of the insured" cases cited by State Farm in its original memorandum in support of its motion to dismiss. Regardless of whether reference is being made to "an employee" of the insured, "the family" of the insured or "the insured" himself, the phrase "the insured" determines whose family or whose employee is meant.

The relevance of the above cases can be illustrated another way. On page four (4) of the policy at bar, there are 16 exclusions labeled

(a) - (p). The above mentioned "employee" exclusion is contained in exclusion (h) immediately above exclusion (i) which is being debated in the case at bar. Both exclusions contain the phrase "the insured". According to the definition section on page three of the policy "insured" has the same meaning in both exclusion (h) and exclusion (i). Thus, if a jurisdiction has determined that the phrase "the insured" in exclusion (h) refers to the particular insured for whose protection the policy is invoked, it must necessarily follow that the same phrase has the same meaning in exclusion (i). To hold otherwise is completely illogical.

It is not essential for this court to even prefer the interpretation given to the phrase "the insured" by the courts cited above in order to grant appellant's request for a reversal of the lower court's ruling. The court need only find that an ambiguity exists regarding the phrase's meaning. Since so many courts have disagreed with each other over the phrase's meaning, it would appear that an ambiguity obviously exists. To hold that an ambiguity does not exist necessarily means this court believes that the decisions relied upon by appellant are clearly erroneous and that no reasonable mind would ever have rendered such a decision. Surely the courts which rendered said decisions cannot be so batantly maligned.

(3) <u>The phrase's ambiguity is reflected by State Farm's acts of uncertainty regarding the phrase's meaning</u>.

If the meaning of the "insured" in State Farm's automobile

insurance policy is so clear why didn't State Farm rely on this exclusion when asserting in their letter to Mr. Golliheair of August 24, 1964, that the insurance policy did not provide coverage for the accident? Moreover, why was the point not brought to Mr. Golliheair's attention until December 21, 1964 when after researching the question, counsel for State Farm finally discovered the "true" meaning of the phrase and related this information to Mr. Golliheair in a letter dated December 21, 1964.

If the exclusion's meaning is not even apparent to State Farm's Resident Claims Supervisor upon examination of the policy, or to an attorney without first researching court decisions on the question, how can it be asserted that the ordinary policy holder would know what the exclusion meant?

II.

THE TRIAL COURT ERRED IN GRANTING STATE FARM'S MOTION TO DISMISS IN THAT THE INTENT OF THE PARTIES REGARDING THE SCOPE OF INSURANCE COVERAGE TO BE PROVIDED BY THE INSURANCE POLICY IN QUESTION WAS AT LEAST A QUESTION OF FACT TO BE DETERMINED BY A JURY.

As an alternative ground for reversing the court below, Appellant contends that, if nothing else, the question of intent as reflected in State Farm's policy is a question of fact for the jury to determine.

In Wilmington Trust Co. v. Travelers Ins. Co., 109 F.Supp. 437 (D.C. Del.1952) the court held that under New York law the question of what the insurance coverage was intended by the parties to an insurance contract is a fact question for the jury when the provisions of the contract contain an ambiguity. This same rule was stated as follows in Amstutz v. Prudential Ins. Co. of America, 26 N.E.2d 454, 456 (1940):

> "While it is the function of a court to construe a contract, it is the province of the jury to ascertain and determine the intent and meaning of the contracting parties in the use of uncertain or ambiguous language."

Other cases with similar holdings include:

Dale v. Preg, 294 F.2d 434 (9th Cir 1953);

Floyd v. Ring Const. Corporation, 165 F2d 125 (9th Cir 1948); and

Stetson v. Investors Oil, Inc., 140 N.W.2d 349 (N.D.1966).

CONCLUSION

For the foregoing reasons as stated in the arguments in the body of his brief, the United States District Court for the District of Alaska erred in granting State Farm Mutual's motion to dismiss for failure to state a claim, and the judgment should be reversed and the United States District Court for the District of Alaska should be instructed to proceed to hear plaintiff-appellant's cause of action.

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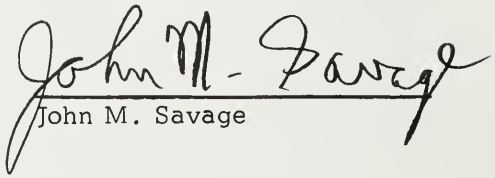
Attorneys for Appellant

By John M. Savage
John M. Savage

CERTIFICATE

I certify that, in connection with the preparation of this rief, I have examined revised Rule 18 of the United States Court of ppeals for the Ninth Circuit, and that, in my opinion, the foregoing rief is in full compliance with the rules.



John M. Savage